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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~265~~ 27

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

vs.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF APPELLANTS

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Preliminary Statement

Much of Appellees' Brief was anticipated in Appellants' previously filed Brief and there is no need to duplicate here what was there presented. This Reply Brief is therefore limited to analyzing certain of Appellees' arguments for the purpose of defining more precisely the areas of disagreement. There is no intention here to introduce new issues or authorities.

ARGUMENT

I.

Appellants Are Indigent.

These Appellants are poor. This is substantiated by the record below and the Appendix before this Court. More importantly, Appellants' poverty was alleged in the complaint initiating this proceeding and conceded by Appellants' motion to dismiss that complaint. (See opinion below, A. 42)

Yet now, a year and a half later, Appellees seem to contest Appellants' poverty. This is done through Appellees' Brief, at p. 20, by reference to an Appendix C. This Appendix appears to indicate that a Mrs. Perez* now has a divorce proceeding pending and a Mrs. Barker settled a negligence suit in 1967.

The weight and relevance of Appendix C are speculative at best. Certainly the settlement of a negligence suit for an undisclosed amount two years ago has little present significance. Nor does the filing of a divorce action subsequent to the present proceeding negate poverty at the time this proceeding was initiated. In any event, vague speculations affecting only two of the Appellants hardly disqualify the remainder or the class they represent.

There is little point in conjecture concerning Appellees' Appendix C. That Appendix is an improper attempt to introduce evidence at the Appellate level. And it is an attempt to contest an issue which was conceded below. Ap-

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* By letter filed with this Reply Brief, Mrs. Perez has withdrawn from this Appeal.

pellees should have filed an answer, not a motion to dismiss, in the District Court if they had wished to controvert Appellants' allegations of poverty. Having failed to do so, they are precluded from raising the issue now.

This is true, as well, of Appellees' several references (Appellees' Brief, pp. 9 and 20) to resources supposedly possessed by the organization "representing" Appellants. In fact, Appellants are represented by an attorney, not an organization. Neither the attorney nor the organization employing him has funds to pay Appellants' court costs. (Appellees' Brief, p. 9, clearly acknowledges this.) If Appellees contend otherwise, they should have so alleged in the District Court. Instead, they conceded Appellants' indigency by a motion to dismiss.

Further, whether or not some private organization or individual has funds to pay court costs is irrelevant. The state may not abdicate its responsibility in the hope that charities will fill the void thus created.

Finally, Appellees may contest Appellants' poverty upon remand by this Court. If this Court finds in Appellants' favor, a remand will be necessary to the District Court for appropriate action. At that time, any of the Appellants who are no longer poor would, of course, not be entitled to relief. Appellees remain free to raise the issue then.

But they may not raise the issue of poverty now, since this case is now before the Court only upon the pleadings. And Appellees, by their own pleading, have admitted Appellants' poverty for purposes of this appeal.

II.

Due Process Guarantees the Right to Petition the Courts for a Divorce Even Though Divorce Itself Is Not Constitutionally Guaranteed.

Appellees point out in their Brief (pp. 3 and 4) that "Divorce is a statutory right which the state is not required to provide." So much may be conceded. But Appellees then state that "Due process can only protect constitutionally guaranteed rights." Appellees conclude that, since Appellants seek divorces, no constitutional guarantees are involved.

This misconceives the issue. Appellants' constitutional claim does not relate to divorce, but to the right to petition for redress of grievances. That right is guaranteed by the due process clause of the Fourteenth Amendment. *NAACP* v. *Button*, 371 U.S. 415 (1963), *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964) and *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217 (1967). Connecticut, by barring Appellants from its courts, has acted in contravention of the United States Constitution.

Appellees argue (Brief, p. 21) that the *Button*, *Trainmen* and *Mineworkers* decisions are not authority here because:

> Essential to each decision is the court's determination that group assembly to provide legal services is an undeniable element of due process. But divorce can only be granted by statutory authority.

Such an interpretation misconstrues the thrust of these cases. True, group assembly was involved in each case,

and such assembly is constitutionally protected. But the purpose of assembly was to petition for redress of grievances, a right equally protected. Indeed, in many circumstances, without the latter right there would be little point in assembly.

It is immaterial that the ultimate redress Appellants seek is a matter of statute. Statutory litigation was among the objectives of the groups in the *Trainmen* and *Mineworkers* cases. Yet this Court held that the states there could not deny access to the courts.

Thus, Appellants draw a critical distinction. They do not argue that there is a right to divorce, but only a right to *seek* a divorce. Put another way, Appellants do not claim a right to redress, but only a right to *petition* for redress. The States may deny that redress; they may, as Appellees suggest, totally abolish divorce (Appellees' Brief, p. 22). But they may not arbitrarily and unjustifiably deny the opportunity to petition for redress where divorce exists by law.

III.

The Equal Protection Clause Guarantees Equal Access to the Courts.

The Connecticut statutes involved here require litigants to pay filing fees and service of process expenses. They do not expressly discriminate against the poor. Yet their effect is to bar the poor from the courts.

Appellees curiously argue that the effect of these statutes may be ignored. They claim that any resulting inequality is permissible because it is "unintentional and accidental"

(Appellees' Brief, p. 10; see also p. 3). This might make sense if human beings were abstractions in a closed system of logic. But legislation affects life, and the effect of legislation on the living is of manifest importance.

This is no "novel" idea, as Appellees suggest (Brief, p. 10). Nor is it true, as Appellees assert (Brief, p. 10) that:

> A state's forbearance from unintentional discrimination has never been required by this court, except in cases involving the liberty of an accused.

As long ago as *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886) this Court struck down a statute which was fair on its face but discriminatory in effect. And in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), the "separate but equal" doctrine in education was invalidated. That doctrine, which did not involve "liberty" of an accused, was eminently fair in logic but patently unfair in impact. This is equally true of the statutes involved here. Their effect cannot be ignored.

The most important case in this area, of course, is *Griffin* v. *Illinois,* 351 U.S. 12 (1956). Even Appellees acknowledge (Brief, p. 10) that *Griffin* involves the ". . . concept that even unintentional inequality violates due process." Appellees therefore labor to distinguish *Griffin* from the instant case. The effort is prodigious but unproductive.

Appellees argue (Brief, pp. 3, 10 and 11) that *Griffin* and the cases following it are "criminal" cases, involving "liberty." But this hardly begins to describe those cases. The *Griffin* line of cases involves the broad, fundamental rights of equal protection of the laws and access to the courts. The loss of liberty through criminal process in

those cases only lent urgency to the need for vindicating such rights.

Even on a superficial, semantical level, Appellees cannot distinguish *Griffin* from this case. *Griffin* was not a "criminal" case, nor were the cases following it, since in each the "criminal" process had ended. The individuals involved were seeking to pursue their "civil" appeal and post-conviction remedies. And the litigants in those cases did not seek "liberty." Rather they sought access to the courts, with the ultimate hope of obtaining liberty.

Appellees also argue (Brief, p. 3; see also p. 13) that the " . . . Griffin Doctrine should be limited to cases where the state is a participating adversary." There is no citation for this proposition and its meaning is unclear. What is clear, however, is that the State of Connecticut is most emphatically a "participating adversary" in this case. Only the State has kept Appellants from its courts. And it is the State, through its agents, which is the real Appellee here. This is precisely what was involved in *Griffin*.

Finally, in trying to distinguish *Griffin*, Appellees argue (Brief, p. 3; see also p. 11) that "This Griffin Doctrine should not be extended to include divorce since divorce does not have sufficient weight on the scale of justice." Further, Appellees contend (Brief, p. 11):

> The essential nature of a divorce is not consistent with the status of a fundamental right. Divorce is not an original activity, i.e., the participants' status is necessarily controlled by a precedent action *voluntarily* done. For divorce, the factor is marriage. Appellees urge that there is no constitutional right to be extracted from a predicament of one's own creation.

If nothing else, this argument has the merit of novelty.

Appellees' contention that a voluntary act precludes constitutional safeguards hardly merits response. Criminals in this country, by a voluntary act of crime, surround themselves with constitutional safeguards. Appellees apparently favor those who break the law over those who keep it.

Such a view was rejected in the recent case of *Suber* v. *Suber*, —— N.J. ——, —— A.2d —— (Docket No. M-2366-68, Superior Court of New Jersey for Union County, August 25, 1969). There the Court ordered service of process arranged on constitutional grounds for an indigent divorce litigant, saying (p. 5, memorandum of opinion):

> "It is not hard to understand the cynicism of the people of the ghetto towards our legal system as an outlet for grievances and disputes. A person charged with a criminal offense is brought before the bar of justice expeditiously. He is given a free trial, free lawyer and, if necessary, free appeals. Yet a deserted woman, *who feels as imprisoned as a convict* and who may be able to free society of the burden of supporting her if she could remarry, is denied the relief of our courts. *It is unjust to give better treatment to those who break society's laws than to those who attempt to live by the rule of law and order.*" (emphasis supplied)

This language not only makes clear the relevance of *Griffin* to this case, but it also establishes the gross unfairness of Appellees' position. Justice would be strangely skewed if courts were open to felons, yet closed to those who keep the law and honor it by seeking justice in the courts.

As to Appellees' concern with the "essential nature" of divorce and its weight on the "scales of justice," the issue

here is not whether Appellants are entitled to divorce. The significance of divorce is simply to demonstrate that Appellants are concerned with matters of substance. They are not seeking personal enrichment or vengeance. Nor are they using the courts for a matter which could be settled privately. By its laws, Connecticut has declared that divorce is sufficiently important to be affected with a public interest. Appellees cannot now argue otherwise.

Thus, this Court need not find that divorce weighs heavily on the scales of justice. Indeed, the opposite inquiry is in order: is divorce so devoid of importance as to be beyond constitutional cognizance? Perhaps drivers' licenses and hunting licenses are of such minimal significance, as Appellees suggest (Brief, p. 14). But clearly divorce is distinguishable from these, and the equal protection clause protects a person's right to sue for a divorce.

Appellees, however, argue that (Brief, p. 17) "The ability to proceed *in forma pauperis* in civil litigation has always been viewed as a privilege." From this they apparently conclude that a privilege may be extended or denied irrationally or whimsically. But as the Court noted in *Griffin,* proceedings *in forma pauperis* may indeed be constitutionally protected. And if a matter is so protected, it is of little importance whether it be labeled gratuity, privilege or right. See, e.g., *Flemming* v. *Nestor,* 363 U.S. 603, 610 (1960) and *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963).

The federal *in forma pauperis* statute, despite Appellees' argument (Brief, p. 18), is not to the contrary. True, a federal *in forma pauperis* appeal may not be taken if it is frivolous or malicious. But this does not deny equal protection, since any federal appeal may be dismissed on such grounds. *Coppedge* v. *United States,* 369 U.S. 438

(1962); *Ellis* v. *United States*, 356 U.S. 674 (1957). The point is not *how* the proceeding is conditioned, but whether the conditions apply *equally*.

Appellees, by using such terms as "privilege," by attempting to limit *Griffin*, by deprecating the significance of divorce, and by claiming that the discrimination here is unintentional, concede the central fact of this case: Appellants are the victims of invidious discrimination. The very skill with which Appellees labor to avoid this issue attests to its importance. And the central weakness of Appellees' argument is that if they are successful, Connecticut will continue this discrimination.

The equal protection clause of the Fourteenth Amendment to the United States Constitution was designed to preclude just such a result.

IV.

Since the Challenged Statutes Involve Suspect Criteria and Impinge Upon Constitutional Rights, They May Be Justified Only by a Compelling State Interest; It Is Not Enough for Them to Be Reasonably Related to a Legitimate State Goal.

The State of Connecticut has discriminated against Appellants on economic grounds. By doing so, it has denied not only equal protection of the laws but also the due process guarantee of the right to petition for redress of grievances. Thus, the State is employing "suspect criteria" to deny a constitutional right. See *Shapiro* v. *Thompson*, —— U.S. ——, 22 L. Ed. 2d 600, 615 (1969), and Mr. Justice Harlan's dissent at 22 L. Ed. 2d 629-630. Such action can

only be justified by "a *compelling* governmental interest." *Shapiro* v. *Thompson* at 22 L. Ed. 2d 615; see also, *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942), *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944), *Carrington* v. *Rash,* 380 U.S. 89, 96 (1965), *Harper* v. *Board of Elections,* 383 U.S. 663 (1966), *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967).

Appellees have not shown a compelling interest in barring Appellants for Connecticut Courts. Indeed, Appellees argue (Brief, p 8) that Connecticut " . . . is attempting to solve the problem of access to her courts by the poor." If this be true, it is hardy consistent with a compelling interest to exclude Appellants.

Appellees claim (Brief, p. 15) that they need only show a "rational relationship to a legitimate state interest" in order to bar Appellants from the courts. They claim, further, that (Brief, p. 16) a compelling state interest need be shown only

> " . . . when the state is a party and can directly affect the outcome of a case but that need does not exist in civil actions where the state does not directly participate."

Thereby, Appellees seek to distinguish, *inter alia, Shapiro* v. *Thompson, supra, Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966) and *Carrington* v. *Rash,* 380 U.S. 89 (1965).

But in each of these cases the state or its agents occupied the precise role here occupied by Appellees, who are Connecticut's agents. Further, the issue was the same: whether the state could deny certain benefits by arbitrarily

classifying citizens. These cases, then, are precisely in point. Before Appellees may deny Appellants access to the courts they must show a compelling state interest.

There is no such interest. If Connecticut wishes to deter frivolous litigation, it must do so for the rich and poor alike. Connecticut has not done so, although there are means available. If the state wishes to raise new revenue, it may do so, just as it may protect its present finances. But no new revenue will flow from barring these Appellants from the courts, and no present revenue will be lost by admitting them. At most, Connecticut may have to pay an undetermined but relatively small amount to effect service of process on behalf of Appellants. As to this, this Court has said in *Shapiro* v. *Thompson,* —— U.S. ——, 22 L. Ed. 2d 600, 614 (1969):

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot be an independent ground for an invidious classification.

Appellees' attempt to justify their discrimination is identical to that rejected by the Supreme Court of Oregon in the recent decision in *O'Connor* v. *Mullins,* —— Oreg. ——,

— P.2d —— (No. 40550, Aug. 28, 1969). There the Court held it had inherent power to waive filing fees for a plaintiff who wished to institute a suit for replevin and damages. It said:

> The fear has been expressed that, if the poor are allowed to litigate without paying the "deterring" court fees, they will inundate the courts with frivolous cases. This attitude overlooks the fact that the poor are most often ignorant of judicial processes, except insofar as they are the victims of such processes. Not only do they not know what remedies exist for the wrongs done them and not only are they ignorant of the procedures for availing themselves of these remedies, but their attitude toward the courts is one of fear.
>
> The experience of the small claims courts should demonstrate how groundless is the fear that the poor will abuse the judicial process. The original purpose of these courts was to help the poor to recover small claims without the aid of counsel. According to Professor Samore, that purpose has failed miserably. Samore, *supra,* citing Kronheim, XX Va. L. Weekly, *Dicta* No. 7 (1967) and Murphy, *Small Claims—The Forgotten Courts?* 25 Legal Aid Briefcase 167 (1967). These courts are used more to prosecute claims against the poor than claims by them.
>
> Speaking of the invalidity of the hypothesis that fees serve a useful purpose in discouraging litigation, Lee Silverstein, director of research and publications, National Legal Aid and Defender Association, said in his article *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases, supra* at 25-26:

"A second practical disadvantage of the proposal [that the court system be completely free to litigants, as are administrative agencies, schools, libraries, parks, etc.] is that merely eliminating court fees and costs would not be enough to make the courts accessible to the poor. Some system is needed to cover the auxiliary expenses of litigation, such as publication fees, bond premiums, fees of investigators and expert witnesses, and, in some jurisdictions, court stenographers. More important, the system must assure that an attorney is provided for the litigant. Further, even if all the financial requisites of litigation are either eliminated or subsidized, many good claims and defenses will go unasserted, especially by the poor. This is because the courts typically hold sessions Monday through Friday between 9 and 5 (or shorter hours) at courthouses in central business districts. The typical workingman or woman must forego at least half a day's pay to make use of the courts, and possibly more, depending on such factors as the type of work he does, how far he must travel, how long he has to wait for his case to be called, whether the case is continued, whether he has to appear once to file the case and another time for trial, etc."

V.

This Case Is Appropriate for Judicial Resolution.

Appellees argue that (Brief, p. 2) " . . . essential to our democracy is a tripartite system of government where no branch interferes with the activities of another." Appellees conclude therefore that this Court should defer to the Connecticut legislature. But the Connecticut legislature is not a branch of government coordinate with this Supreme Court. That position is occupied by the Congress of the United States.

The arrogance of Appellees' position lies as well in the omniscience ascribed to the Connecticut Legislature. Despite Appellees' argument, it may be doubted that "The legislature is best equipped to answer questions about socio-economic factors" (Appellees' Brief, p. 9). But even if true this would not mean other bodies must abdicate their constitutional responsibilities. As woefully inept (in Appellees' view) as this Court may be, it nevertheless must discharge its duties. In arrogating exclusive competence to the Connecticut legislature, Appellees have gone beyond reason and authority.

There is also a certain hypocrisy in Appellees' contention (Brief, p. 9) that Connecticut is attempting

> " . . . through innovation and analysis to find the best possible criteria (sic) to base an in forma pauperis statute. The alternatives are many; proper selection is necessarily a function of the legislative process."

In point of fact, the Connecticut legislature has slammed the door on "innovation and analysis." At its last ses-

sion, the legislature was "unable to agree," to use Appellees' phrasing (Brief, p. 8), on an *in forma pauperis* bill. More precisely, the legislature totally rejected any such legislation. This is the "innovation and analysis" of which Appellees are so enamored.

Ironically, the two instances of "innovation" cited by Appellees involve action by Connecticut executive agencies, not the legislature. This is true of the grants to New Haven Legal Assistance Association. And it is equally true of the proposed Welfare Legal Services project. (See Appellees' Brief, p. 8 and Appendix B.) Neither of these efforts is particularly "innovative,"* and neither helps Appellants. More importantly, as *executive* action, they constitute an indictment of the legislature's inaction.

Appellees' reliance upon the legislature is thus misguided. Equally misguided is their disdain for the capacity of courts to engage in "innovation and analysis." That capacity, which Appellees arrogate to the legislature, may be found as well and perhaps more often in the judiciary.

There is nothing complex or insoluble in the whole host of problems which Appellees conjure up to confound this Court. (See Appellees' Brief, pp. 6 and 7.) Similar problems, although far more difficult, were posed in *Gideon* v.

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*Note that the welfare project allocates only $1000 to court costs. Thus, perhaps only fifteen *in forma pauperis* law suits would be possible. And only seventy-five clients will be served by the entire project at a prohibitively high cost of nearly $1000 per client. One wonders how Appellees can advocate such a program and yet criticize waiver of court costs as overly expensive. (See Appellees' Brief, pp. 14-15.) Further, there is gross inefficiency in requiring the Welfare Department to raise funds in order to pay fees charged by another state department. Common sense would dictate simply waiving those fees. Finally, all of this "innovation" simply duplicates existing services.

Wainwright, 372 U.S. 335 (1963). There, this court faced the legal complexities and the practical considerations involved in requiring states to appoint counsel for indigents. Even more complex problems were raised by the law and the realities of desegregation in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) and the one-man-one-vote rule of *Baker* v. *Carr,* 369 U.S. 186 (1962). A court which could confront these cases need hardly flee before the straw men advanced by Appellees.

In any event, the problems posed by Appellants are peripheral to the basic issue: whether Connecticut may deny Appellants' rights. Appellees attempt to avoid the issue by saying that there are many ways to assure these rights, and the choice may be difficult. But this in effect concedes that the basic dispute is soluble. This Court, then, should so find, and order a solution. If the legislature at its next session wishes to adopt an alternative solution assuring Appellants' rights, it is free to do so.

As to this, the Court in *Suber* v. *Suber,* —— N.J. ——, —— A.2d —— (Docket No. M-2366-68, Superior Court of New Jersey for Union County, August 25, 1969) said, in ordering service of process as a matter of constitutional right for an indigent divorce plaintiff (p. 5, Memorandum of Opinion):

> "It has been urged that judicial restraint should be exercised in this case. It is argued that the legislature should handle this problem and this Court should not upset the court procedure under the aegis of equal protection.
>
> This Court would welcome legislative action in this area. But, in the absence of such action, this Court

> sees an injustice which must be remedied. This injustice is unconstitutional by today's standards . . . ,
>
> • • • • •
>
> A judgment in the amount of the costs in issue will be granted against the State. *This Court will leave to the State the question of administration. Which department of the State will pay the judgment is to its discretion.*"

This Court should pursue the course followed in *Suber* v. *Suber*, ordering immediate relief for Appellants. Connecticut would be free to "innovate and analyze" further, if it really wants to do so. But in the meantime, Appellants would not be barred from the courts simply because a state legislature is paralyzed by indecision.

Conclusion

Appellees' position is constructed of contrivances, devoid of credibility: They say a group may petition for redress of grievances but an individual may not. Somehow, they assert, discrimination is tolerable if unintentional. They would allow the wealthy to bring frivolous suits, but the poor are barred whether or not their suits have merit. And no compelling state interest for such discrimination need be shown if it saves money. Divorce, they claim, is a privilege barely nudging the scales of justice, and *Griffin* v. *Illinois* was decided in a vacuum, so that neither justice nor precedent has any relevance for women who, on whimsy, gaily contemplate the frivolity of divorce. And, lastly, these are not matters for the courts, since only a legislature can understand them.

Perhaps there is merit in the last contention. For clearly enough Appellees' position passes the understanding of laymen, like Appellants, who know little law but can recognize justice. As to justice, the Constitution speaks plainly enough. It guarantees due process, the right to petition for redress of grievances and equal protection of the laws. Yet even a layman can see that Appellees propose to deny these to Appellants.

And then there is Appellees' argument that Connecticut needs time to "innovate and analyze" the best ways to help Appellants. This seems little more than cynical dissembling in view of Connecticut's fixed legislative intention to do quite the opposite. There will be nothing new from the legislature. Connecticut's judiciary, too, has closed its doors with equal firmness to Appellants.

Thus, the simple, plain fact is that Appellants have been excluded from the Courts because of their poverty. And Connecticut intends to continue this exclusion, despite the Constitution and without regard for the consequences to Appellants' lives.

No nation founded on justice can tolerate such a practice. And no nation indifferent to such a practice can pretend to be just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ARTHUR B. LAFRANCE, attorney for the plaintiffs, depose and say that on the 17th day of October, 1969, I served a copy of the foregoing Brief on the defendants by mailing copies first class postage prepaid to the following attorneys of record:

Robert K. Killian, Raymond J. Cannon, Edward J. Peters, 30 Trinity Street, Hartford, Connecticut.

ARTHUR B. LAFRANCE

Sworn to and subscribed before me, this 17th day of October, 1969.

OLIVIA H. BIRCHETT
Notary Public
My Commission Expires
January 24, 1972

[SEAL]

PETITION FOR RE-HEARING

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FILED
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JOHN SEAVER, C

Supreme Court of the United States

OCTOBER TERM, 1970

No. 27

GLADYS BODDIE, BERTHA BARKER, ANN DeNICOLA, MARYANN DOZIER, BETTY ANN PEREZ, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

APPELLANTS' BRIEF ON REARGUMENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 27

GLADYS BODDIE, BERTHA BARKER, ANN DeNICOLA, MARYANN DOZIER, BETTY ANN PEREZ, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

v.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, CLERK OF THE SUPERIOR COURT OF CONNECTICUT FOR NEW HAVEN COUNTY; JUDGE JOSEPH S. LONGO, SUPERIOR COURT OF CONNECTICUT; JUSTICE JOHN P. COTTER, COURT ADMINISTRATOR, SUPREME COURT OF CONNECTICUT,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

APPELLANTS' BRIEF ON REARGUMENT

PRELIMINARY STATEMENT

This case was argued in December of 1969 and scheduled for reargument in June of 1970. Because nearly one year has elapsed since Appellants' Reply Brief was filed, this supplementary Brief is being submitted. The purpose is simply to call to the Court's attention various decisions and authorities arising during the past year and which have rele-

vance for this appeal. There is no intention of repeating here the comprehensive argument presented in Appellants' earlier Briefs.

ARGUMENT

I. APPELLANTS WERE DENIED EQUAL PROTECTION OF THE LAWS WHEN THEY WERE DENIED ACCESS TO THE COURTS SOLELY BECAUSE OF THEIR POVERTY.

Appellants' Brief argued (pp. 4-14) that Appellants were denied access to the courts of Connecticut simply because they were poor. A number of cases were then cited for the proposition that such discrimination contravenes the Fourteenth Amendment guarantee of equal protection of the laws. (See Brief, pp. 15-26.) The keystone case, of course, was *Griffin v. Illinois*, 351 U.S. 12 (1956).

Three recent decisions by the Court of Appeals for the District of Columbia Circuit lend support to Appellants' position. In each, the Court ultimately decided the issue before it on statutory grounds. But in each, the Court also noted the constitutional dimension of the case and implied that the result reached by statutory interpretation was compelled by the Constitution.

In *Lee v. Habib*, 424 F.2d 891 (D.C. Cir. 1970), an indigent defendant in an eviction proceeding sought a free transcript for appeal. In an opinion by Judge Wright, the Court said (p. 901):

> *The equal protection clause applies to both civil and criminal cases*; the Constitution protects life, liberty and property. It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance to a court in deciding what procedures are constitutionally required in each case. Often a poor litigant will have more at stake in a civil case than in a criminal case.
>
> * * *

> *The right of all to have free access to the courts is basic to our democratic system.* It too cannot be conditioned on the payment of a fee where such a condition precludes the exercise of the right. Just as the pool tax bears no relation to voter qualification, a litigant's ability to pay for a transcript bears no relation to the justice of his position in a suit against him for eviction.
>
> Civil cases, of course, are different from criminal cases in that the state is not always the moving party. But this difference does not establish that the underlying principle of *Griffin* is completely inapplicable to civil cases. None of the equal protection cases discussed above has focused on the state's direct involvement in the criminal proceeding. Instead, the Court focused on the deficiencies of procedures whereby rich litigants received more thorough consideration of their appeals than did poor litigants. *Court procedures which of themselves invidiously discriminate between rich and poor impair guarantees of equal justice* which the Constitution was designed to protect. As *Shelley v. Kraemer* teaches, the Courts themselves may not be vehicles of discrimination. (Emphasis supplied.)

In *Harris v. Harris*, 424 F.2d (D.C. Dir. 1970), indigent plaintiffs sought to sue *in forma pauperis* for divorce. The lower court, in language reminiscent of Appellees' Brief (p. 11), had said (424 F.2d at 809):

> Here the parties have created a situation by their own act. They separated voluntarily. The taxpayers of the District of Columbia did not ask these two people to get married. They did not ask them to separate. They should not be made to underwrite the legal procedures to terminate the relationship.

The Court of Appeals, by MacKinnon, J., held (p. 811):

> Since Congress has prescribed certain statutory grounds for divorce it is beyond the authority of any court to impose additional grounds thereto. More

> specifically *it is not proper to use a divorce action as a ground for denying any such person access to a fair trial* . . . since under the statute one's ability to pay the costs of a divorce action is not a condition precedent to obtaining a divorce. . . . The *in forma pauperis* statute does not exclude divorce actions. It would be unthinkable that Congress would, by statute, permit well-to-do persons to obtain divorces and withhold that right from indigent persons. (Emphasis supplied.)

And in *Thompson v. Mazo*, 421 F.2d 1156 (D.C. Cir. 1970), the Court of Appeals held that an indigent defendant in a possessory action could not be denied a hearing because of inability to post a $3000 bond. In an opinion by Bazelon, C. J., the Court said (p. 160):

> Due process and equal protection considerations loom on the horizon when the diminution of rights is based on an economic classification not required by the ends to be served.[11]

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[11]The state *can* set certain conditions for access to the courts. For example, it may screen out frivolous or dilatory actions, provided that the mesh of the screen is open enough not to snare those with valid claims whose only failing is penury. Another requirement . . . is that the plea of title be under oath. . . . *Any regulation which uses a financial hurdle simply to discourage suits, some of which might be taken in bad faith, is open to serious constitutional challenge*, since it would appear to operate from the doubtful premises that the rich are less likely than the poor to maintain frivolous actions. Cf. *Tate v. United States*, supra. (Emphasis supplied.)

These three cases, although ultimately decided on statutory grounds, bear directly on Appellants' equal protection argument. Certainly they rebut Appellees' contention that the *Griffin* line of cases applies only to "criminal" cases, or cases where the state is a moving party. And these cases recognize the great importance of access to the courts, as being "basic to our democratic system." See also, *Note*, 37

Fordham L. Rev. 661 (1969) and *New York's New Divorce Law*, 5 Col. J. Law and Soc. Prob. 2:1, 16 (1969).

Two other important decisions should be noted. Although they did not directly involve access to the courts, *Williams v. Illinois*, ___ U.S. ___ (1970) and *Dandridge v. Williams*, 397 U.S. 471 (1970) did involve application of the equal protection clause to indigents. Consequently, their rationale–if not their holdings–are of importance here.

In *Williams v. Illinois*, supra, an indigent prisoner was held beyond the maximum jail term because of his inability to pay a fine. This Court found a denial of equal protection, saying (38 L.W. 4607, 4608-4609):

> . . . when the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination which rests on ability to pay, and accordingly, we reverse.
>
> * * *
>
> . . . once the state has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.
>
> It is clear, of course, that the sentence was not imposed upon appellant because of his indigency but because he had committed a crime. And the Illinois statutory scheme does not distinguish between defendants on the basis of ability to pay fines. But, as we said in *Griffin v. Illinois, supra*, "a law nondiscriminatory on its face may be grossly discriminatory in its operation" . . . . Here the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. *On its face the statute extends to all defendants an apparently equal opportunity* for limiting confinement to the statutory maximum simply by satisfying a money

> judgment. *In fact this is an illusory choice for Williams or any indigent who, by definition, is without funds.* . . . By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment. (Emphasis supplied.)

This Court's language, referring to men in physical bondage, could apply with equal force to these Appellants, who are in social bondage. The relevance of *Williams* to this case was made ever greater by footnote 20 to the Court's opinion which dealt with court costs, the matter involved in the present proceeding, saying:

> . . . inability to pay court costs cannot justify imprisoning an indidgent beyond the maximum statutory term since the Equal Protection Clause prohibits expanding the maximum term specified by statute simply because of inability to pay.

The decision in *Williams* deals with the very type of discrimination posed here. This Court's opinion in *Williams* makes short shrift of Appellees' argument (Brief, p. 10) that a statute which is fair on its face, although discriminatory in effect, passes muster under the equal protection clause. The decision in *Williams* also rebuts Appellees' argument (Brief, pp. 6-7) that a holding for Appellants would involve intolerable administrative problems for the State, by saying (38 L. W. at 4609-4610):

> We are not unaware that today's holding may place a further burden on States in administering criminal justice. Perhaps a fairer and more accurate statement would be that new cases expose old infirmities which apathy or absence of challenge have permitted to stand. But the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo.

The only possible distinction between Appellants' case and *Williams* is that the latter is a "criminal" case. But, as noted above, and in Appellants' earlier Briefs, that is a distinction which lacks logic and authority. Further, if this Court had intended to limit the rationale of *Williams* to criminal cases, it could have done so by employing an appropriate constitutional guarantee other than equal protection, such as that prohibiting excessive fines and cruel and unusual punishment. United States Constitution, Amdt. VIII.

The decision in *Dandridge v. Williams*, 397 U.S. 471 (1970), while again not precisely in point, also lends support to Appellants' position. There, welfare recipients challenged State maximum grant limitations on equal protection grounds. This Court upheld such limitations. No denial of equal protection was found, since the case only involved "state regulation in the social and economic field, not effecting freedoms guaranteed by the Bill of Rights . . ." 397 U.S. at 484. Therefore, *Dandridge v. Williams* did not involve the more stringent equal protection test employed in *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Clearly, had a freedom guaranteed by the Bill of Rights been involved in *Dandridge*, a different result would have been reached. Such a freedom is involved here: the First Amendment guarantee of the right to petition for redress of grievances. The importance of this right has been recognized many times by this Court. Indeed, it was characterized as ". . . at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . ." in *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907). The point here is not to argue again the importance of this right (see Appellants' Brief, pp. 26-30), but simply to emphasize that the denial of that right makes Appellants' argument more compelling than the argument advanced in *Dandridge v. Williams*. Hence, Appellees must meet the more stringent test of *Shapiro v. Thompson*, not the lesser test of *Dandridge v. Williams*.

Even if this were not so, the test of *Dandridge v. Williams* would suffice to void the statute challenged here. There *was* minimal rationality for the maximum grant limitation, since it tended to equalize the positions of the working and nonworking poor, thus encouraging employment. In contrast, there is *no* rationality to barring the poor from the courts. (See Appellants' Brief, pp. 38-49). Indeed, doing so not only denies a constitutional right but, in addition, works a grievous hardship upon the poor. (See Appellants' Brief, pp. 24-26, 45-49).

In sum, the decisions construing the Equal Protection Clause since Appellants' last Brief strengthen materially Appellants' reliance on that clause.

Those lower federal courts which have considered the issue have all tended to support Appellants' position. And this Court's equal protection decisions–*Williams v. Illinois* and *Dandridge v. Williams*–are equally consistent with Appellants' argument. Indeed, only label-gamesmanship can distinguish *Williams v. Illinois*, under the cavil that "criminal" and "civil" cases have no relation to each other, though both are embraced by the equal protection clause. And while the result in *Dandridge v. Williams* may be distinguished, the rationale clearly favors these Appellants, who rely on First Amendment guarantees and challenge a statute totally lacking in rational basis.

II. APPELLANTS WERE DENIED DUE PROCESS OF LAWS WHEN THEY WERE DENIED THE OPPORTUNITY TO PETITION FOR REDRESS OF GRIEVANCES.

Appellants have argued earlier that the First and Fourteenth Amendments of the United States Constitution assure their right to petition for redress of grievances. (See Appellants' Brief, pp. 26-37.) They have been denied that right solely by reason of poverty. This constitutes a denial of due process of laws.

Support for Appellants' position may be found in two recent decisions of this Court: *Sniadach v. Family Finance*, 395 U.S. 337 (1969) and *Goldberg v. Kelly*, 397 U.S. 254 (1970). While neither case is precisely in point, both dealt with the due process assurance of a fair hearing for the poor. It is just such a hearing which has been denied these indigent Appellants.

In *Sniadach*, state law permitted a creditor to deprive a wage earner of income without a hearing. In *Goldberg v. Kelly*, state law permitted the welfare department to do the same to a welfare recipient. In the present case, state law permits a court to deprive these Appellants of the right to divorce and remarry without a hearing.

It may be said that here the Appellants have been deprived by their own act of marrying. And yet in *Sniadach* the debtor voluntarily contracted his debt. So also, in *Goldberg v. Kelly*, the welfare recipient voluntarily sought welfare assistance. The due process issue does not inhere so much in the individual's conduct as in that of the State.

Perhaps it may be argued that in *Goldberg v. Kelly* and *Sniadach* are distinguishable because there it was the State which acted against the individual. Yet clearly *Sniadach* involved action by a private party. And, in any event, there has been state action here: the legislature has said that Appellants may not dissolve their marriage without court action and the courts have denied relief *without a hearing.*

Yet, it may be contended that these Appellants seek a benefit-divorce-from the State, whereas the individuals in *Sniadach* and *Goldberg v. Kelly* sought to redress a grievance previously inflicted by the State. This approach would limit *Sniadach* and *Goldberg v. Kelly* to prior hearings: i.e., a hearing prior to the infliction of injury. But that is precisely what these Appellants seek, since the State has denied them a divorce because of poverty, both by legislative fiat and court action. And even if they are viewed as applying for a new right, under such a view the debtor in *Sniadach* may be viewed as merely seeking relief from a wage garnish-

ment, and the welfare recipient in *Goldberg v. Kelly* may be viewed as simply applying for welfare. Obviously, if there is a due process right to a fair hearing before rights are terminated, there must be a right to such a hearing on initial application. Appellants seek such a hearing.

It is important to emphasize that Appellants do not claim a constitutional right to divorce but only a right to petition for divorce. This has been denied them without a hearing just as surely as Sniadach's wages and Kelly's welfare benefits were denied. And Appellants' loss is the more serious. For Appellants have lost *all* opportunity to be heard, unlike *Sniadach* and *Goldberg v. Kelly*, where the Appellants could have obtained a hearing subsequent to their injury. Thus, Appellants assert the right to be heard involved in *Sniadach* and *Goldberg v. Kelly*, but in a more basic form, for they have been denied the right *first* to petition in order *then* to be heard.

Thus the rationale of *Sniadach* and *Goldberg v. Kelly* applies to this case. So also does the compelling concern reflected in those cases for the plight of the poor. This was reflected in Justice Douglas' discussion of the impact of garnishments on the poor in *Sniadach*, 395 U.S. at 340-341. It is perhaps more fully reflected in Justice Brennan's language from *Goldberg v. Kelly*, 397 U.S. at 261-262, 264. As Appellants have argued in their Brief (pp. 45-49), for the poor, divorce and remarriage are often the best means of achieving economic betterment and social stability. So viewed, barring Appellants from obtaining divorces is much like terminating welfare assistance. As this Court said in *Goldberg v. Kelly*, (397 U.S. 264-265):

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing and medical care. . . . Thus the crucial factor in this context —a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose government largesse is ended—is that termination of aid pending resolution

> of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.
>
> * * *
>
> From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal amlaise that may flow from a widespread sense of unjustified frustration and insecurity. . . . The same governmental interests which counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

The lanugage quoted above concerning welfare assistance could as easily have been written about divorce and remarriage for the poor.

Goldberg v. Kelly is also significant because it counters one of Appellees' most strongly urged arguments: that divorce and *in forma pauperis* litigation are mere privileges which the State may deny or condition at will. The following appears at 397 U.S. 261-262 in *Goldberg v. Kelly*:

> Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. Such benefits are a matter of statutory entitlement for persons qualified to receive them.

> Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right'.

The conclusion is inescapable that important state benefits, whether they be called fundamental rights or mere gratuities, must be extended equally and fairly to all.

In *Goldberg v. Kelly* there were dissents by Chief Justice Burger and by Justices Black and Stewart. It may be worth emphasizing that the grounds for dissent there do not apply here. Chief Justice Burger dissented because H.E.W. regulations would have provided relief by July of 1970 and, further, complex matters of welfare administration are better determined by Congress and the States. Here, there is no complex interplay between state and federal governments and the Connecticut legislature–although it has had ample opportunity–denied the relief Appellants seek. Justice Black dissented because the Fourteenth Amendment was designed primarily for racial discrimination and did not authorize what might be viewed as judicial "legislation" in an area of mere gratuities. But here, by contrast, Appellants assert a First Amendment right which antedates the Reconstruction and which is as fundamental as free speech and assembly. And Justice Stewart dissented primarily because those existing proceduressof the state in *Goldberg v. Kelly* appeared to satisfy the minimal requirements of due process. In contrast, no hearing whatsoever was afforded Appellants; they were not even allowed to file their papers in court.

It would seem, then, that the due process rationale of *Sniadach* and *Goldberg v. Kelly* is applicable here. This is supported also by certain concurring opinions in other cases. Thus, in *Williams v. Illinois*, ___ U.S. ___, 38 L.W. 4607 (6/30/70), which was decided on equal protection grounds, Mr. Justice Harlan concurred on due process grounds, saying (38 L.W. at 4614):

> I, for one, would prefer to judge the legislation before us in this case in terms of due process, that is to determine whether it arbitrarily infringes a constitutionally protected interest of the petitioner.

By reference to *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) and *Flemming v. Nestor*, 363 U.S. 603, 611 (1960), he argued that there are limits to the presumption of constitutionality accorded a statute which denies a basic liberty, and even one which confers a non-contractual benefit under a social welfare scheme ". . . if the statute manifests a patently arbitrary classification, utterly lacking in rational classification." 38 L.W. at 4615. As Appellants have argued above and in their Brief (pp. 38-48), just such a classification is involved here. See also the concurring opinion of Mr. Justice Harlan in *Dandridge v. Williams*, 397 U.S. 471 (1970), re-emphasizing the nature of the proper due process test, and in *Sniadach v. Family Finance*, 395 U.S. 337 (1969), finding that the statute there did not meet the test.

Thus Appellants' suit lends itself well to a due process analysis. They have been denied the due process guarantees of a fair hearing as well as the right to petition for such a hearing. And the basis for this denial is a statute lacking even minimal rationality. Due process has clearly been denied.

A due process approach to this case does not involve merely a re-phrasing of Appellants' equal protection argument. The implications of an equal protection argument arguably reach to aspects of court procedures other than fees and, as well, to state fees other than those for court procedures. It may well be, then, that this Court would seek a narrower ground for granting relief. The due process clause affords such a basis. (See Part III of this Brief.)

III. THE RATIONALE FOR RELIEF IN THIS CASE MAY BE OF A LIMITED NATURE

Chief Justice Burger, dissenting in *Goldberg v. Kelly*, 397 U.S. 254 (1970) expressed a concern for the implications of the majority opinion. It may be appropriate, then, to note that the relief sought here need not involve unpredictable or far-reaching consequences for future litigation. A holding for Appellants may, instead, rest on quite narrow grounds.

It may be claimed, for example, that a holding for Appellants would necessitate a later decision assuring counsel or expert assistance in civil cases. Such a result is avoided by Appellants' due process argument, which is grounded on the explicit First Amendment guarantee of the right to petition for redress of grievances. There is no similar guarantee of civil counsel or expert assistance in civil cases.

In the altnerative, this Court chould hold as a matter of equal protection that a state may be compelled to equalize the opportunity to be heard, but not the varying resources of litigants who take unequal advantage of that opportunity. The latter is simply an impossibility. And the denial of the opportunity to be heard is a far more "final and disastrous" thing than failure to afford counsel once the opportunity to be head has been granted. See *Burns v. Ohio*, 360 U.S. 252, 258 (1959). This Court, in interpreting the equal protection clause, may properly limit it to matters of fundamental import, such as the right to be heard and to disparities created by the State, not by private litigants. As to other matters, the equal protection standard is either inapplicable or is met by the minimal showing required in *Dandridge v. Williams*, supra.

It may also be argued that waiving fees for court matters will compel waiving them for marriage licenses, dog licenses and all other state-franchised activities. But, again, this ignores Appellants' due process reliance on the First Amendment right to petition for redress of grievances. There is no constitutional guarantee which in similarly explicit language embraces state fees generally. And, as a matter of equal

protection, it seems clear that litigation, particularly that affecting marital status, is of greater social and constitutional significance than dog licenses. Waiving fees for court proceeding would seem a more imperative matter than waiving the minor revenue levies which states impose on luxuries, recreation and activities not of a fundamental nature.

Still another possible argument may be that Appellants' position would require waiving costs for all litigation, no matter how petty or frivolous, if brought by indigents. But Appellants' litigation involves matters of fundamental import. Further, it involves matters which the State *requires* be resolved by court order. And, as for frivolity, there is nothing to indicate that Appellants' divorce actions lack merit.

As a matter of due process, it would seem a denial of due process to require a citizen to go into court for certain matters and then bar him. And it would seem a denial of equal protection for a state benefit, so conditioned, to be available only to the wealthy. These considerations do not apply to most litigation, which may often be brought on a contingent fee basis, or may involve matters which are not required to be settled in court, or may raise issuessof petty significance.

As this discussion makes apparent, a due process analysis of Appellants' case permits a fairly precise, narrowly bounded holding, based on the explicit First Amendment guarantee of the right to petition for redress of grievances. Such a holding would have few implications for other state activities or fees, or for requiring the State to do more in civil litigation than waive fees. And even waiving fees might be required as a matter of due process only where the subject of litigation—as here—was itself constitutionally cognizable or was required by state law to be resolved in the courts.

In contrast, an equal protection approach has far broader implications. And yet it too may, if this Court desires, be appropriately limited along lines similar to those involved in a due process approach. This case involves the constitutionally guaranteed right of access to the courts, and the subject

of Appellants' suit is not only fundamental but cannot be settled privately. The application of the equal protection clause to such a case need not impel a similar application in other cases lacking these characteristics. Particularly is this so since the presence of a First Amendment right in this case means that the challenged statute must meet the more demanding test of *Shapiro v. Thompson*. In many other cases, the absence of this factor would permit a lesser standard, which a statute with only minimal rationality might satisfy.

CONCLUSION

Appellants have been denied not only the right to a minimally fair hearing on their divorce claims but even the right to *petition* for such a hearing. Yet such a right is unqualifiedly accorded all those wealthy enough to pay court costs. Whether measured by the First Amendment, coupled with the Fourteenth Amendment due process clause, or the equal protection clause standing alone, such a result is manifestly unconstitutional.

No other conclusion would seem tenable. The only impediment—if impediment there be—to sustaining Appellants' cause would be fear of the implications. With this in mind, Appellants have demonstrated that a holding in their favor may be narrowly based and drawn, limiting any implications for future litigation.

And yet, were this not so, even the most far-reaching of consequences would still not warrant denying what is otherwise just. This Court may wisely choose to act cautiously; but it has never confused caution with timidity. The many landmark decisions of this Court diminish this case, in comparison, to insignificance.

But the importance of this case to Appellants cannot be minimized. They have been subjected to invidious discrimination preventing them from governing—as do others—their marital affairs. Nothing could be more central to the very

fabric of Appellants' existences. And nothing could affect more profoundly their futures.

It is in these terms that the relief Appellants seek should be measured.

Respectfully submitted,

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